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In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

TED R. GRAYSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The original judgment order of the court of appeals (Pet. App. D) is not reported. The opinion of the court on rehearing (Pet. App. A) is reported at 550 F. 2d 103.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on January 7, 1977, and a petition for rehearing was denied on March 17, 1977 (Pet. App. C). On April 7, 1977, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including May 16, 1977. The petition was filed on May 10, 1977, and was granted on October 3, 1977. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a trial judge, in determining an appropriate sentence for a convicted defendant, may take into account his belief that the defendant lied at trial.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Pennsylvania, respondent was convicted of prison escape, in violation of 18 U.S.C. 751(a). He was sentenced to two years' imprisonment, to be served consecutively to the three-year prison term he was already serving.

1. On October 11, 1975, respondent escaped from the Federal Prison Camp at Allenwood, Pennsylvania, where he had been confined since August 29, 1975, under a three-year sentence for distributing a controlled substance (App. 8). Two days later respondent was apprehended by agents of the Federal Bureau of Investigation at an apartment in New York City (App. 9, 18–19). At the time of his arrest, respondent denied that he was Ted Grayson (App. 11, 19).

At trial, respondent testified that he had left Allenwood under duress because he had been threatened by another inmate, Alex "Sarge" Barnes. According to respondent, he had owed Barnes 40 cartons of cigarettes for losses in a poker game, Barnes had threatened and assaulted him on a number of occasions when respondent had failed to meet demands to pay the debt in cash, and he had been confronted

by Barnes, wielding "a long board * * * with a nail protruding through it," on the evening of the escape (App. 23–29). Respondent also claimed that he had not reported these incidents to prison authorities because of his doubts that the guards could protect him, that he had escaped by climbing over the prison camp fence, that he had worn his prison trousers on the trip from Pennsylvania to New York, and that he had not attempted to avoid apprehension by law enforcement authorities following his unauthorized departure from Allenwood (App. 30, 45–49, 52).

Respondent's story was substantially discredited on rebuttal. Barnes testified that, although he had played cards with respondent in prison, they had never gambled for cigarettes, respondent had not owed him cigarettes or money as a result of a poker debt, and he had never argued with or threatened respondent (App. 65–67). In addition, correctional officials testified that, although respondent had repeatedly asked to be moved to the Metropolitan Correction Center in New York City to be closer to his girlfriend, he had never mentioned threats by other inmates as an additional reason requiring his transfer from Allenwood and that, shortly after the escape, a pair of prison trousers had been found next to respondent's shirt and jacket outside a hole in the prison fence (App. 72–77, 92–93).

In imposing sentence after the jury's verdict of guilty, the trial judge stated that he would "give [his] reasons for sentencing in this case with clarity, because one of the reasons may well be considered by

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a Court of Appeals to be impermissible * * *" (App. 107). The judge then expressed his belief that respondent had perjured himself at trial (*ibid.*):[1]

> In my view a prison sentence is indicated, and the sentence that the Court is going to impose is to deter you, Mr. Grayson, and others who are similarly situated. Secondly, it is my view that your defense was a complete fabrication without the slightest merit whatsoever. I feel it is proper for me to consider that fact in the sentencing, and I will do so.

2. On appeal respondent contended, *inter alia*, that the district court had impermissibly relied in sentencing on its belief that respondent had lied at trial. The court of appeals initially affirmed without opinion (Pet. App. D). After respondent filed a petition for rehearing arguing that rejection of his contention was inconsistent with *Poteet* v. *Fauver*, 517 F. 2d 393 (C.A. 3),[2] however, the case was reheard and a divided panel of the court of appeals vacated respondent's

[1] In denying a motion for a new trial, the district court had earlier remarked that respondent's trial testimony "was a total fabrication and had no semblance of plausibility" (Pet. App. 4a, n. 2).

[2] *Poteet* involved a collateral attack on a bank robbery sentence imposed by a New Jersey court. At sentencing, the trial judge had attempted to extract confessions from Poteet and his co-defendant, Borowski. Borowski admitted his participation in the robbery and was sentenced to five years' imprisonment. Poteet refused to confess and was sentenced to a prison term of 14 to 16 years. The Third Circuit reversed the order of the district court denying relief and directed that Poteet be resentenced. See pp. 21–22, *infra*.

sentence and remanded for resentencing (Pet. App. A).[3]

In a separate opinion announcing the judgment of the court, Judge Garth stated his view that *Poteet* was controlling. While Judge Garth recognized that *Poteet* involved a significantly different factual setting,[4] he nonetheless concluded that the decision stood for the general principle, applicable here, that "'the sentencing judge may not add a penalty because he believes that the defendant lied'" (Pet. App. 8a). Judge Adams, concurring in the judgment, agreed that the "language and holding" of *Poteet* "inveigh against the practice of augmenting a sentence on account of a trial judge's belief that a defendant uttered false testimony" (Pet. App. 15a), but he added (*id.* at 15a–16a):

> Even if it were to be concluded that *Poteet* does not control the present case, I would have serious misgivings about the propriety of the sentencing procedure employed by the trial judge here. * * * If a trial judge increases a sentence because he is of the belief that a defendant's testimony is untruthful, such an action could be interpreted as penalizing the defendant for exercising his constitutional

[3] The government thereupon filed a petition for rehearing with a suggestion of rehearing *en banc*, which was denied, two judges dissenting (Pet. App. C).

[4] Judge Garth noted that in *Poteet* "the State trial judge was unsuccessful in his attempt to force Poteet to admit his guilt after the verdict and after a co-defendant had been forced to 'confess'" and "added ten years to Poteet's sentence because of his failure to 'confess'" (Pet. App. 7a).

> right to take the stand. In addition, this practice could have the impermissible effect of deterring future defendants from testifying in their own behalf. Also, the defendant is, in effect, being punished for perjury, a separate offense that can be the subject of a criminal prosecution.

Judge Rosenn, dissenting, distinguished *Poteet* from the present case on the ground that "[t]he sentencing judge emphasized that he was not concerned with Poteet's false testimony on the stand but with Poteet's refusal to confess *after* the jury had rendered its verdict against him" (Pet. App. 19a; emphasis in original). He also rejected the constitutional arguments that troubled Judge Adams, observing that the sentencing judge "was not imposing any sentence for any independent crime; he was merely considering the behavior and character of the defendant as he saw the defendant and heard the evidence during the trial in his imposition of sentence for the underlying crime" (*id.* at 22a; footnote omitted). Judge Rosenn therefore concluded (*id.* at 30a):

> The exclusion from the scope of the [sentencing] judge's inquiry of visible and clear conduct of the defendant in the presence of the judge during trial needlessly limits the judicial process in dispensing justice and adds little to the due process interests of the defendant.[*]

[*] Judge Rosenn did suggest two limitations on the sentencing judge's discretion to consider a defendant's false trial testimony: the judge should be "convinced beyond a reasonable doubt that the defendant intentionally lied on material issues of fact," and "the falsity of the defendant's testimony [should] be necessarily established by the finding of guilt" (Pet. App. 30a–31a).

SUMMARY OF ARGUMENT

A. Sentencing is perhaps the most difficult task of a federal district judge. Because the premise of the federal sentencing process is that "the punishment should fit the offender and not merely the crime" (*Williams* v. *New York*, 337 U.S. 241, 247) the district court in a relatively short time must learn as much as it can about the nature of the individual who has been convicted and must then use that knowledge to arrive at a sentence that is both wise and just.

Congress has recognized the difficulty of this task by providing trial judges with special tools to assist them in developing an adequate record upon which to fix a suitable sentence. Thus, Congress has authorized the district court to consider, not only the facts adduced during trial and at a sentencing hearing, but also presentence investigation reports prepared by the probation service and studies prepared by the Attorney General and the Bureau of Prisons, each of which includes details of the defendant's prior criminal record as well as substantial other information regarding his character and behavior. The appellate courts have consistently upheld the legality of sentences based upon the trial judge's assessment of this diverse information, the sole limitations being that the matters considered must be reliably established and reasonably related to a recognized purpose of sentencing. In short, as this Court has observed, given his responsibility the sentencing judge "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may

consider, or the source from which it may come." *United States* v. *Tucker*, 404 U.S. 443, 446.

B. The district court's belief that a defendant has committed perjury at trial is surely the kind of information that may legitimately be taken into account in this individualized approach to sentencing. A defendant's willingness to lie under oath in an effort to escape the consequences of his unlawful actions indicates his continued disrespect for the necessity to obey societal rules, whether or not they are beneficial to one's personal interests, and may therefore serve as an accurate barometer of the defendant's need for, and prospects of, rehabilitation and reformation. Eight courts of appeals have accordingly upheld the appropriateness of considering a defendant's false trial testimony in fixing a proper sentence.

Indeed, a trial judge's determination that a defendant has committed perjury on the witness stand is in many ways more probative, and more reliable, than many of the other sources and types of information that courts regularly take into account in imposing sentence. The determination is based upon the judge's personal observations, rather than the impressions of others; it is formed after hearing admissible evidence and sworn testimony, subject to cross-examination, rather than hearsay reports; and it is one of the most recent indicia of the nature of the defendant's character, generally occurring within days or weeks of sentencing.

None of the reasons offered by the court of appeals justifies a blanket prohibition against a sentencing judge's consideration of a defendant's perjury. Un-

like *Poteet* v. *Fauver*, 517 F. 2d 393 (C.A. 3), on which the court principally relied, consideration of the fact that the defendant intentionally lied at trial would not punish the assertion of a constitutional right, since there is no right to commit perjury. Nor are there any due process or double jeopardy objections to the sentencing proceedings in this case. Respondent was informed prior to the imposition of sentence that the trial judge intended to rely upon his trial testimony, which the judge termed "a complete fabrication without the slightest merit whatsoever" (App. 107), and he was afforded the opportunity to deny or explain it. Moreover, the trial judge's consideration of prior criminal activity in fixing sentence for a subsequent crime was not the equivalent of multiple punishment for the earlier offense, but rather was a permissible factor to be taken into account in determining the degree of punishment that should be imposed for the offense of which respondent had been convicted.

Finally, a rule permitting the trial judge to consider a defendant's perjury in sentencing would not impermissibly deter defendants from taking the stand in their own defense. The defendant's prime concern at trial is the avoidance of a conviction. It is exceedingly unlikely that a defendant would jeopardize his chance of an acquittal by foregoing the presentation of truthful, exculpatory testimony because of the remote possibility that he would be convicted and that the court would erroneously view his testimony as false and would enhance his sentence accordingly. More important, a defendant must consider a number

of possible adverse consequences when he decides whether to testify in his own behalf, including his exposure to cross-examination, to the introduction of damaging evidence about his character and credibility, and to the possibility of a subsequent perjury prosecution. The likely impact of his testimony on his eventual sentence is merely one more factor that a defendant must assess. The criminal process, like the rest of the legal system, "is replete with situations requiring 'the making of difficult judgments' as to which course to follow." *McGautha* v. *California*, 402 U.S. 183, 213, quoting from *McMann* v. *Richardson*, 397 U.S. 759, 769.

ARGUMENT

A TRIAL JUDGE, IN IMPOSING SENTENCE UPON A CONVICTED DEFENDANT, MAY TAKE INTO ACCOUNT HIS BELIEF THAT THE DEFENDANT LIED AT TRIAL

The court of appeals held that respondent must be resentenced by the district court without consideration of his false trial testimony. According to Judges Garth and Adams, the trial judge could not be allowed to weigh respondent's testimony in fixing a suitable sentence, even after finding it to be "a complete fabrication without the slightest merit whatsoever" (App. 107), because to do so would penalize respondent for exercising his rights, would violate due process by punishing him for perjury without notice of the charge or an opportunity to be heard, or would deter other criminal defendants from taking the witness stand by placing an unfair burden on their right to testify.

We submit that the court of appeals' decision manifests a fundamental misunderstanding of the role played by a defendant's false trial testimony in the sentencing determination and improperly restricts the district court's wide discretion, expressly and repeatedly approved by this Court and Congress, to consider all relevant and reliable evidence concerning a defendant's background and character in selecting an appropriate sanction for his criminal offense. Moreover, none of the rationales proferred by the panel majority in support of this restriction can withstand analysis.

A. THE DISTRICT COURT HAS BROAD DISCRETION TO CONSIDER ALL RELIABLE EVIDENCE RELEVANT TO THE DETERMINATION OF A SUITABLE SENTENCE

1. Sentencing is generally considered to be the most difficult, and most important, task of a federal trial judge.* In large part this difficulty is attributable to the nature of the federal sentencing process. As Judge Marvin Frankel, one of the more informed and thoughtful observers of this process, has written:

> [T]he prevalent thesis of the last hundred years or so has been that the treatment of criminals must be "individualized." The Mikado's boast, we have proudly thought, was silly; the punishment in a civilized society must fit the unique

* See, *e.g.*, Frankel, *Criminal Sentences; Law Without Order* 54 (1972); Hoffman, *Purposes and Philosophy of Sentencing*, 75 F.R.D. 287; Sobeloff, *Appellate Review of Sentences*, 32 F.R.D. 249, 261; Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 Harv. L. Rev. 1281, 1291 (1952).

> criminal, not the crime. The "crime," after all, may describe with a single, mechanical label kinds of misconduct and, more importantly, kinds of individual offenders displaying no similarities of any substantial sort. To assign rigidly a prescribed penalty for each crime (the so-called "tariff" system) is Procrustean. Sentiments like these carried the day long ago; it is scarcely imaginable that they could be questioned today.

Frankel, *Criminal Sentences; Law Without Order* 9-10 (1972).

In order to ensure that "the punishment should fit the offender and not merely the crime" (*Williams* v. *New York*, 337 U.S. 241, 247), Congress has provided a maximum and, on occasion, a minimum penalty for each criminal offense, often with a wide gulf in between, and has delegated to the district court the exclusive responsibility for choosing an appropriate term of imprisonment, period of probation, or fine from a broad and varied range of options. Unfortunately, however, the sentencing process is not simply a matter of ascertaining certain objectively demonstrable facts about a particular defendant and then translating those facts into months or years of confinement. Rather, sentences "turn on a discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done." Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 Minn. L. Rev. 803, 813 (1961). "For the determination of sentences," this Court has

observed time and again, "justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender. His past may be taken to indicate his present purposes and tendencies and significantly to suggest the period of restraint and the kind of discipline that ought to be imposed upon him." *Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U.S. 51, 55. See also *Gregg* v. *Georgia*, 428 U.S. 153, 189; *Williams* v. *Illinois*, 399 U.S. 235, 243; *North Carolina* v. *Pearce*, 395 U.S. 711, 723; *Williams* v. *New York*, *supra*, 337 U.S. at 248-249, n. 13.

Sentencing, then, is an exceedingly individualized, "predictive and discretionary" function. *Morrissey* v. *Brewer*, 408 U.S. 471, 480. For these reasons, a trial judge in the federal judicial system has always been accorded broad latitude regarding the sources and types of information about a defendant that he may utilize to asist him in determining the precise extent and type of sentence to be imposed within the limits fixed by law.

2. Congress, this Court, and the courts of appeals have recognized the wisdom of—indeed, the necessity for—permitting a trial judge to gather and assess a wide variety of information about a defendant prior to imposing sentence. 18 U.S.C. 3577 expressly provides:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense

which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

District courts also have been provided with expert tools to assist them in developing an adequate record upon which to fix a suitable sentence. The court may request a presentence investigation report from the probation service, containing "any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court" (Fed. R. Crim. P. 32(c)(2)); it must allow the defendant, his attorney, and government counsel to present matters in mitigation or enhancement of punishment prior to imposing sentence and may hold an evidentiary hearing to elicit additional information or resolve disputed issues of fact (Fed. R. Crim. P. 32(a)(1)); and, if the court still finds itself insufficiently familiar with the defendant's character or prospects for improvement, it may order a period of temporary incarceration to allow the Attorney General and the Bureau of Prisons to study the prisoner and develop a report that "may include but shall not be limited to data regarding the prisoner's previous delinquency or criminal experience, pertinent circumstances of his social background, his capabilities, his mental and physical health, and such other factors as may be considered pertinent." 18 U.S.C. (1976 ed.) 4205(d). See 18 U.S.C. (1976 ed.) 4205(c), 4252, 5010(e), 5037.

Furthermore, appellate courts have consistently upheld the legality of sentences based upon the trial judge's assessment of this diverse information, the sole limitations being that the matters considered must be reliably established and reasonably related to a recognized purpose of sentencing. See *United States* v. *Tucker*, 404 U.S. 443, 447; *Townsend* v. *Burke*, 334 U.S. 736, 741.[1] Hence, because of its obvious relevance to a number of legitimate sentencing considerations, a defendant's prior criminal conduct has always been viewed as one of the prime factors that a trial judge may take into account in imposing sentence. See, *e.g.*, *United States* v. *Tucker*, *supra*, 404 U.S. at 447; *Williams* v. *Oklahoma*, 358 U.S. 576, 584; *Williams* v. *New York*, *supra*, 337 U.S. at 244. A criminal record may show that prolonged incarceration of a defendant is required for the protection of society, as punishment, or to reform and rehabilitate the offender. Indeed, the probative value of this evidence is so substantial that a defendant's previous misconduct

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[1] This Court has identified the main goals of criminal sentences as:

"1st. The protection of society against wrong-doers.

"2nd. The punishment—or much better—the discipline of the wrong-doer.

"3rd. The reformation and rehabilitation of the wrong-doer.

"4th. The deterrence of others from the commission of like offenses."

Williams v. *New York*, *supra*, 337 U.S. at 249, n. 13, quoting from Glueck, *Probation and Criminal Justice* 113 (1933). See also American Bar Association, *Standards Relating to Sentencing Alternatives and Procedures* § 2.2 (1968) ("The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant."); Frankel, *supra*, at 106.

may legitimately be considered even in the absence of a conviction. The sentencing judge may take note of uncharged criminal acts,[8] arrests,[9] pending indictments,[10] dismissed charges,[11] charges that have been reversed on appeal,[12] and even charges that have ended in an acquittal.[13]

Similarly, evidence of a defendant's status or behavior not amounting to a crime obviously plays an important role in the determination of a proper sentence. It is not only advisable but also essential that the court consider facts bearing on the defendant's

[8] See, *e.g.*, *United States* v. *Bass*, 535 F. 2d 110, 118–120 (C.A. D.C.) (defendant's involvement in large-scale drug dealing); *United States* v. *Crowe*, 516 F. 2d 824, 826 (C.A. 4) (defendant's offer not to testify against a co-defendant in return for cash); *United States* v. *Strauss*, 443 F. 2d 986, 990–991 (C.A. 1), certiorari denied, 404 U.S. 851 (defendant's membership in organized crime syndicate); *Haslam* v. *United States*, 431 F. 2d 362, 364 (C.A. 9), reaffirmed on rehearing, 437 F. 2d 955 (C.A. 9), certiorari denied, 402 U.S. 912 (defendant's failure to appear for sentencing).

[9] See, *e.g.*, *Williams* v. *New York*, *supra*, 337 U.S. at 244; *Smith* v. *United States*, 551 F. 2d 1193, 1195–1196 (C.A. 10), certiorari denied, No. 76-1743, October 3, 1977; *Houle* v. *United States*, 493 F. 2d 915 (C.A. 5).

[10] See, *e.g.*, *United States* v. *Johnson*, 507 F. 2d 826, 829–830 (C.A. 7), certiorari denied, 421 U.S. 949; *United States* v. *Haygood*, 502 F. 2. 166, 169–172 (C.A. 7), certiorari denied, 419 U.S. 1114; *United States* v. *Metz*, 470 F. 2d 1140, 1141–1142 (C.A. 3), certiorari denied *sub nom. Davenport* v. *United States*, 411 U.S. 919.

[11] See, *e.g.*, *United States* v. *Marines*, 535 F. 2d 552, 554–555 (C.A. 10); *United States* v. *Doyle*, 348 F. 2d 715, 721 (C.A. 2) (Friendly, J.), certiorari denied, 382 U.S. 843.

[12] See, *e.g.*, *United States* v. *Atkins*, 480 F. 2d 1223, 1224 (C.A. 9).

[13] See, *e.g.*, *United States* v. *Cardi*, 519 F. 2d 309, 314, n. 3 (C.A. 7); *United States* v. *Sweig*, 454 F. 2d 181, 184 (C.A. 2).

character,[14] age, health and family situation,[15] past life and habits,[16] and a host of other factors that would contribute to an informed exercise of the trial judge's broad discretion. Finally, the court may of course consider the circumstances, both aggravating and extenuating, surrounding a defendant's commission of the crime of which he was found guilty.[17] In sum, it is settled that a sentencing judge "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come" (*United States* v. *Tucker*, *supra*, 404 U.S. at 446) and may take into account any credible information shedding light upon the defendant's "life, health, habits, conduct, and mental and moral propensities" (*Williams* v. *New York*, *supra*, 337 U.S. at 245).

B. THE DISTRICT COURT'S BELIEF THAT A DEFENDANT HAS INTENTIONALLY GIVEN FALSE TESTIMONY AT TRIAL IS RELEVANT TO, AND MAY PROPERLY BE CONSIDERED IN, THE SENTENCING DETERMINATION

1. The discussion thus far has demonstrated that a trial judge in the federal system has virtually limit-

[14] See, *e.g.*, *United States* v. *Carden*, 428 F. 2d 1116, 1118 (C.A. 8); *United States* v. *Ginzburg*, 398 F. 2d 52, 55 (C.A. 3) (*en banc*), certiorari denied, 403 U.S. 931; *Baker* v. *United States*, 388 F. 2d 931, 934 (C.A. 4).

[15] See, *e.g.*, *United States* v. *Dent*, 477 F. 2d 447, 449, n. * (C.A. D.C.); *Welch* v. *United States*, 371 F. 2d 287, 294 (C.A. 10), certiorari denied, 385 U.S. 957. See also 18 U.S.C. 5005 *et seq.* (Federal Youth Corrections Act).

[16] See, *e.g.*, *United States* v. *Marcello*, 423 F. 2d 993, 1012 (C.A. 5), certiorari denied, 398 U.S. 959.

[17] See, *e.g.*, *Williams* v. *Oklahoma*, *supra*, 358 U.S. at 585; *United States* v. *Crow Dog*, 537 F. 2d 308, 310 (C.A. 8); *United States* v. *Barker*, 514 F. 2d 208, 227 (C.A. D.C.), certiorari denied, 421 U.S. 1013.

less discretion to consider reliable information bearing some relevance to the determination of an appropriate sentence. The sentencing judge's belief that the defendant has committed perjury at trial is surely among the types of information that may be taken into account.

A defendant's willingness to lie under oath in an effort to escape the consequences of his unlawful actions, like a defendant's decision to threaten a juror or witness in an effort to obstruct justice or to suborn perjury at his trial (see *Peterson* v. *United States*, 246 Fed. 118 (C.A. 4), certiorari denied, 246 U.S. 661), unquestionably is a telling commentary on his character, revealing the defendant's continued lack of respect for the necessity to abide by societal rules, even those not beneficial to one's personal interests. It may therefore serve as an accurate barometer of the defendant's prospects for rehabilitation and reformation.[18] In a passage worth quoting in full, the Second Circuit has observed:

> The effort to appraise "character" is, to be sure, a parlous one, and not necessarily an enterprise for which judges are notably equipped by prior training. Yet it is in our existing scheme of sentencing one clue to the rational exercise of discretion. If the notion of "repentance" is out of fashion today, the fact

[18] Cf. *Pennsylvania ex rel. Sullivan* v. *Ashe*, *supra*, 302 U.S. at 55 (convict's escape from prison is a relevant factor in sentencing because it "shows him still disposed to evil and determined to remain hostile to society").

> remains that a manipulative defiance of the law is not a cheerful datum for the prognosis a sentencing judge undertakes. * * * Impressions about the individual being sentenced—the likelihood that he will transgress no more, the hope that he may respond to rehabilitative efforts to assist with a lawful future career, the degree to which he does or does not deem himself at war with his society—are, for better or worse, central factors to be appraised under our theory of "individualized" sentencing. The theory has its critics. While it lasts, however, a fact like the defendant's readiness to lie under oath before the judge who will sentence him would seem to be among the more precise and concrete of the available indicia.

United States v. *Hendrix*, 505 F. 2d 1233, 1236 (C.A. 2) (Frankel, J.), certiorari denied, 423 U.S. 897. It is for these reasons that eight courts of appeals have upheld the authority of district courts to consider a defendant's commission of perjury at trial in determining a proper sentence.[19]

[19] In addition to *Hendrix*, see *United States* v. *Lustig*, 555 F. 2d 737, 751 (C.A. 9), pending on petition for a writ of certiorari, No. 77-417; *United States* v. *Gamboa*, 543 F. 2d 545, 547 (C.A. 5); *United States* v. *Nunn*, 525 F. 2d 958 (C.A. 5); *Hess* v. *United States*, 496 F. 2d 936, 939 (C.A. 8); *United States* v. *Moore*, 484 F. 2d 1284, 1287 (C.A. 4); *United States* v. *Cluchette*, 465 F. 2d 749, 754–755 (C.A. 9); *United States* v. *Wallace*, 418 F. 2d 876, 878 (C.A. 6), certiorari denied, 397 U.S. 955; *United States* v. *Levine*, 372 F. 2d 70, 74 (C.A. 7), certiorari denied, 388 U.S. 916; *Humes* v. *United States*, 186 F. 2d 875 (C.A. 10). The District of Columbia Circuit alone is in accord with the decision of the court below. See *Scott* v. *United States*, 419 F. 2d 264, 268–269 (C.A. D.C.).

We submit that there is little basis for permitting a sentencing judge to consider material contained in a presentence report or other extrajudicial documents but prohibiting him from relying upon his first-hand observations during trial. A district court's personal familiarity with the evidence adduced at trial, together with its opportunity for prolonged scrutiny of the defendant's demeanor and behavior during trial (particularly if he chose to take the witness stand), always has been viewed as providing unique insights into an appropriate sentencing disposition. See American Bar Association, *Standards Relating to Sentencing Alternatives and Procedures* § 5.1(a), p. 232 (1968).[20] Moreover, because the judge's belief that a defendant has lied during trial is based upon an evaluation of admissible evidence and sworn testimony, subject to cross-examination, rather than hearsay reports or the conclusory assessments of other persons,

[20] Years before criminal defendants were allowed to testify, they were afforded the opportunity to make an unsworn statement at trial (*Ferguson* v. *Georgia*, 365 U.S. 570, 582–583) and to speak before sentence was imposed (*Green* v. *United States*, 365 U.S. 301, 304). These statements obviously were intended to be considered by the trial judge in imposing sentence. It would be incongruous to permit a defendant's remarks to be considered for sentencing purposes if the judge found them to be truthful but to require that they be ignored if the judge believed them to be false. Cf. *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 32 ("Jury sentencing, based on each jury's assessment of the evidence it hears and appraisal of the demeanor and character of the accused, is a legitimate practice.").

there is less cause for concern about the factual accuracy of this particular predicate for the imposition of sentence. Finally, the defendant's conduct at trial, and especially his decision to offer false material testimony, often will be most probative of his chances for reformation at the time of sentencing because it will have occurred only days or weeks earlier, unlike prior criminal activity or other historical evidence of a defendant's character that may have taken place years before.

In short, a trial judge's belief that the defendant committed perjury at trial may be expected to be reliable and is clearly relevant to legitimate sentencing goals.

2. Although the court of appeals acknowledged the considerable authority supporting use of a defendant's false trial testimony in sentencing (Pet. App. 11a–12a, 16a–17a), it nonetheless concluded that it was bound to reach a contrary result in light of *Poteet* v. *Fauver*, 517 F. 2d 393 (C.A. 3). *Poteet* involved an effort by a state trial judge to coerce a confession from a defendant under the threat of imposing a longer sentence. After a jury had found them guilty of armed robbery, Poteet and his codefendant Borowski appeared for sentencing. Under intense questioning by the trial judge, Borowski eventually admitted his complicity in the robbery and was sentenced to five years at a state reformatory. Poteet, on the other hand, refused to confess his guilt and was sentenced to 14 to 16 years' imprisonment. The court of appeals found a constitutional infirmity in this sentencing proceeding because the trial judge

had penalized Poteet for refusing to waive his privilege against self-incrimination. *Id.* at 397–398."

We agree with the dissenting opinion of Judge Rosenn that the principles announced in *Poteet* have little if any relevance to the issues in this case. See also *United States* v. *Nunn*, 527 F. 2d 1390 (C.A. 5) (Rives, J., concurring in the denial of rehearing). A defendant, even after being found guilty at trial, has a Fifth Amendment privilege not to incriminate himself at allocution, and a sentencing judge may not burden the exercise of that privilege by an express or implied threat to impose greater punishment upon a defendant who refuses to acknowledge his guilt." The district court's consideration of a defendant's false testimony at trial, however, poses no such problem, for there is no constitutional right to commit perjury. See *United States* v. *Wong*, 431 U.S. 174, 178–180; *Harris* v. *New York*, 401 U.S. 222, 225."

Nor is there substance to the fears articulated by Judge Adams, concurring below, that a rule permitting a trial judge to consider a defendant's perjury in sentencing "could have the impermissible effect of deterring future defendants from testifying in their own behalf" (Pet. App. 15a–16a). It is, of course, no criticism of the practice that it would inhibit the mendacious defendant. We therefore assume that Judge Adams' concern is that defendants will be discouraged from giving truthful testimony in their own defense.

Whatever the theoretical niceties of this argument, the belief that a defendant on trial for a criminal offense would be swayed in his determination to take the witness stand by the remote possibility of an adverse consequence at sentencing is quite unrealistic. A defendant's overriding consideration is the avoidance of a conviction; the decision whether his testimony would be helpful in achieving that result depends upon a delicate balancing of a number of variables, such as the credibility of his testimony, his

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[21] The same conclusion was reached in *Scott* v. *United States*, *supra*, 419 F. 2d at 266–268, where the court of appeals held that the sentencing judge had unconstitutionally exacted a price for a defendant's exercise of his Fifth Amendment privilege as well as his Sixth Amendment right to stand trial. See also *Bertrand* v. *United States*, 467 F. 2d 901, 902 (C.A. 5); *Thomas* v. *United States*, 368 F. 2d 941, 945 (C.A. 5). Cf. *North Carolina* v. *Pearce*, *supra*, 395 U.S. at 725.

[22] There is, of course, a significant distinction "between responding favorably to an individual's sincere expression of remorse, and reacting in a hostile way because of a personal belief in the guilt of one who maintains his innocence and seeks review of the judgment." *Scott* v. *United States*, *supra*, 419 F. 2d at 282 (Leventhal, J., concurring). A disparity between co-defendants' sentences that is attributable solely to one defendant's having received a sentence concession based upon his showing of remorse, therefore, would be permissible. Cf. American Bar Association, *Standards Relating to Pleas of Guilty* § 1.8(a)(v) (Approved Draft 1968); *United States* v. *Sweig*, *supra*, 454 F. 2d at 184. The record in *Poteet*, however, left no doubt that the trial judge had increased Poteet's sentence because of the defendant's refusal to acknowledge his guilt.

[23] A defendant, for example, has no constitutional right not to incriminate other persons. See *Rogers* v. *United States*, 340 U.S. 367, 371. Thus, while a district court may not place a "price tag" on a defendant's refusal to incriminate himself at sentencing, it may validly consider his refusal to cooperate in efforts by law enforcement officials to ascertain the criminal involvement of others. See *United States* v. *Vermeulen*, 436 F. 2d 72, 76–77 (C.A. 2), certiorari denied, 402 U.S. 911. Cf. *United States* v. *Hayward*, 471 F. 2d 388, 391 (C.A. 7).

prior criminal record and susceptibility to impeachment, the strength of the government's case, and the availability of other defense evidence. It would be the rare defendant who, having determined that an assessment of these factors dictates that he take the witness stand, would jeopardize his chance of acquittal by foregoing the presentation of truthful, exculpatory testimony because of the speculative concern that his story would appear patently false, the jury would find him guilty, and the trial judge would take his testimony into account for the purpose of enhancing the sentence."[24]

There is, moreover, an additional reason why the court of appeals' worries about an improper "chilling

[24] In *Chaffin* v. *Stynchcombe*, 412 U.S. 17, this Court rejected a similar argument that a defendant would be "chilled" in the exercise of his right to appeal by the possibility that a jury on retrial would impose an increased sentence (*id.* at 33–34; footnote omitted):

"[T]he likelihood of actually receiving a harsher sentence is quite remote at the time a convicted defendant begins to weigh the question whether he will appeal. Several contingencies must coalesce. First, his appeal must succeed. Second, it must result in an order remanding the case for retrial rather than dismissing outright. Third, the prosecutor must again make the decision to prosecute and the accused must again select trial by jury rather than securing a bench trial or negotiating a plea. Finally, the jury must again convict and then ultimately the jury or the judge must arrive at a harsher sentence in circumstances devoid of a genuine likelihood of vindictiveness. While it may not be wholly unrealistic for a convicted defendant to anticipate the occurrence of each of these events, especially in the infrequent case in which his claim for reversal is strong and his first sentence was unusually low, we cannot agree with petitioner that such speculative prospects interfere with the right to make a free choice whether to appeal."

effect" are unpersuasive. The court assumes that every defendant who elects to testify at trial runs the risk that, if convicted, he will be viewed by the sentencing judge as a perjuror. But common sense suggests that "trial judges generally are (or become) sophisticated and experienced enough to know" that this assumption is untrue. *United States* v. *Hendrix, supra*, 505 F. 2d at 1236. Judges are aware that some defendants may have a faulty memory rather than an intent to deceive, that others may protest their innocence in good faith because of their subjective opinion (not shared by the jury) that some essential element of criminal conduct, such as knowledge, intent, malice, or premeditation, has not been proven, and that still others may in fact be innocent despite having been found guilty beyond a reasonable doubt. There is therefore no reason to believe that a district court would routinely augment a sentence merely because the jury chose not to believe the defendant's version of events or that defendants who intend to testify truthfully would be discouraged from taking the stand because of the fear of a stiffer sentence."[25]

[25] Several courts of appeals, in the exercise of their supervisory powers, have cautioned the district court not to treat a defendant's perjury as an adverse sentencing factor unless they are persuaded beyond a reasonable doubt that the defendant committed it. See Pet. App. 31a (Rosenn, J., dissenting); *United States* v. *Hendrix*, *supra*, 505 F. 2d at 1236–1237; *United States* v. *Moore*, 484 F. 2d 1284, 1288 (C.A. 4). Although we doubt that such a rule is necessary or even consistent with the standards applied in connection with other factors considered in sentencing (*e.g.*, the relative culpability of co-defendants), it is in any event clear that these limita-

Even if the court of appeals' concern about a "chilling effect" were less fanciful, however, it would still not be impermissible to allow sentencing judges to consider a defendant's false testimony in assessing his character. A number of factors legitimately may dissuade a defendant from testifying at trial. For example, a defendant may be convinced not to take the stand because of the fear that he might be subjected to a perjury prosecution (*United States* v. *Williams*, 341 U.S. 58) [26] or searching cross-examination (*Brown* v. *United States*, 356 U.S. 148, 154–156) [27] or that the jury would be informed of his prior convictions for purposes of impeachment (see *Spencer* v. *Texas*, 385 U.S. 354; Fed. R. Evid. 609), yet it has never seriously been suggested that the existence of these consequences improperly burdens a defendant's right to

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tions were satisfied by the district court in this case. Respondent's testimony was directly contradicted by substantial other evidence at trial and was termed "a complete fabrication without the slightest merit whatsoever" (App. 107) by the sentencing judge. Moreover, in view of respondent's elaborate explanation for his escape from Allenwood, it is exceedingly unlikely that the jury would have believed his testimony and returned a guilty verdict.

[26] Such prosecutions have been instituted on occasion, suggesting that the fear is not an idle one. See, *e.g.*, *United States* v. *Gonsales*, 551 F. 2d 862 (table) (C.A. 5), certiorari denied, No. 77–5101, October 31, 1977; *United States* v. *Tramunti*, 500 F. 2d 1334 (C.A. 2), certiorari denied, 419 U.S. 1079; *United States* v. *Haines*, 485 F. 2d 564 (C.A. 7), certiorari denied, 417 U.S. 977; *United States* v. *Manfredonia*, 414 F. 2d 760 (C.A. 2).

[27] The cross-examination may even extend to matters that would not otherwise be admissible. *Oregon* v. *Haas*, 420 U.S. 714, 722; *Harris* v. *New York*, *supra*, 401 U.S. at 225–226.

testify in his own defense. Perhaps of more importance, a defendant may decide not to testify for fear that the jury might disbelieve his story and be more disposed to return a guilty verdict, yet no one has ever urged that jurors must be instructed not to do so lest the defendant be deterred from giving evidence.

Indeed, the Court has rejected a quite similar argument of impermissible "chilling effect" in *Crampton* v. *Ohio*, a companion case to *McGautha* v. *California*, 402 U.S. 183. *Crampton* involved a state procedure by which guilt and punishment were determined by the jury at a single trial. Under the Ohio unitary-trial rule, the defendant could remain silent on the issue of guilt only by surrendering his chance to be heard by the jury on the issue of punishment and could testify on the issue of punishment only by waiving his privilege against self-incrimination on the question of guilt, an election (defendant argued) that "create[d] an intolerable tension between constitutional rights." *Id.* at 211. This Court disagreed, observing that "[t]he criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. *McMann* v. *Richardson*, 397 U.S. [759,] 769," and that the situation faced by defendants in unitary trials was no different from a host of other "choices with which criminal defendants and their attorneys are quite routinely faced." *Id.* at 213, 215. It is, said the Court, "not thought inconsistent with the enlightened administration of criminal justice to require the defendant

to weigh such pros and cons in deciding whether to testify." *Id.* at 215. These principles, expressed in response to the contention that a defendant has a right to speak to his sentencer free from any adverse consequences on the issue of guilt, are equally applicable to respondent's analogous claim that a defendant must be allowed to testify at trial without apprehension that his testimony will be considered at sentencing.

Finally, Judge Adams suggested (Pet. App. 16a) that it is improper to take a defendant's false statements into account at sentencing because "the defendant is, in effect, being punished for perjury, a separate offense that can be the subject of a criminal prosecution." To the extent that this objection rests on due process or double jeopardy grounds, it is unpersuasive. Respondent was informed prior to the imposition of sentence that the trial judge believed his testimony to be false and intended to consider it. He could have argued to the court that his testimony was truthful (explaining, for example, why other, contradictory evidence at trial was untrustworthy or why the jury might have believed him but still convicted) or he could have offered mitigating circumstances for his behavior.

Nor was the Double Jeopardy Clause violated.[28] Consideration of prior criminal activity in fixing sentence for a subsequent crime "is not the equivalent of multiple punishment for the earlier offense, but

[28] Even if correct, the claim would presumably be available only in a subsequent perjury prosecution.

rather is a permissible method of determining the degree of punishment that should be imposed for the later offense." *United States* v. *Haygood, supra,* 502 F. 2d at 169. See *Williams* v. *Oklahoma, supra,* 358 U.S. at 584–586.[29] As Judge Rosenn correctly noted in dissent (Pet. App. 22a; footnote omitted):

> [The trial judge] was not imposing any sentence for any independent crime; he was merely considering the behavior and character of the defendant as he saw the defendant and heard the evidence during the trial in his imposition of sentence for the underlying crime.
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In sum, we do not contend that it would be impossible to devise a rational system under which a trial judge's discretion to consider and evaluate reliable evidence relevant to sentencing would be strictly circumscribed. Congress is in fact now considering legislation that would restructure the federal sentencing process by limiting the range of permissible sentences for each category of offense and by identifying with more precision the factors that must be weighed by the district court in selecting a sentence within that range.[30]

[29] Habitual offender statutes have consistently been sustained against double jeopardy challenges on the same basis. See, *e.g.*, *Spencer* v. *Texas*, *supra*, 385 U.S. at 559–560; *McDonald* v. *Massachusetts*, 180 U.S. 311, 312.

[30] See Part III of S. 1437, 95th Cong., 1st Sess. (1977), the sentencing provisions of the proposed revision of Title 18 of the United States Code, which was favorably reported out of the Senate Judiciary Committee on November 2, 1977.

Our present sentencing system, however, is otherwise. The currently prevailing view is that the trial judge's consideration of "the fullest information possible concerning the defendant's life and characteristics" (*Williams* v. *New York, supra,* 337 U.S. at 247) is an indispensable prerequisite to a reasoned sentencing determination. That being so, it makes bad law and little sense to carve out an exception for the highly probative and reliable evidence considered by the district court in this case. Respondent's willingness to lie under oath was of substantial relevance to his need for, and prospects of, rehabilitation, and the court of appeals erred in ruling that the district court could not legitimately take that into account at sentencing.

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it vacated respondent's sentence and remanded the case to the district court for resentencing.

Respectfully submitted.

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